Supreme Court, U.S.
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No. 96-1089

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

UNITED STATES OF AMERICA, PETITIONER

vs.

MICHAEL CURTIS KEYS, RESPONDENT

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION AND PROPOSAL FOR JOINDER

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The respondent, Michael Curtis Keys respectfully requests that this court deny the petition for Writ of Certiorari that seeks review of the Ninth Circuit's opinion below. That opinion as reported at 95 Fed.Rptr.3d 874 (9th Cir., 1996) is reprinted in Appendix A of the Acting Solicitor General's Petition for a Writ of Certiorari. The decision rendered by the En Banc Panel was the correct decision.

Should the Court grant the Petition for a Writ of Certiorari filed by the Acting Solicitor General, it is respectfully requested that the current briefing in the matter of Johnson vs. United States, Case No. 96-203, be reset so that the above entitled matter, the Keys matter, which is the subject of the Petition for Certiorari by the Acting Solicitor General, be joined and consolidated into that appeal before the United States Supreme Court and that briefing be permitted as well as joinder and oral argument in the above case.

QUESTIONS PRESENTED

Whether the court of appeals correctly reversed respondent's perjury conviction under the harmless error rule, Fed.R.Crim.P. 52(a), instead of affirming under the plain error rule, Fed.R.Crim.P. 52(b), where respondent did not object at trial to the district court's failure to submit the issue of materiality to the jury, and where there was no serious factual question concerning the materiality of respondent's false testimony.

STATEMENT OF THE CASE

Mr. Keys was charged with perjury at his trial in the district court in the Central District of California. At the time of the trial, the element of materiality was decided by the trial court as a matter of law without submission to the jury for its factual finding and determination of proof beyond a reasonable doubt. There was no objection made by defense counsel to submission of "materiality" to the court due to the "solid wall of circuit authority" which would have made any objection futile, and that plain error review of a Gaudin-type error under those circumstances would be "unconscionable". [Petition for Certiorari at p. 5; 95 F.3d 878 (9th Cir., 1996)].

The jury convicted Mr. Keys of perjury without considering the element of materiality in regards to the testimony given by Mr. Keys. An appeal was taken to the panel of the Ninth

Circuit Court of Appeals. The panel found in favor of the government and found, based upon current case law, the error at the trial was harmless under plain error and it would be a disservice to society to retry Mr. Keys on the same issue, adding the element of materiality for jury consideration.

A Petition for En Banc Review was filed by the Respondent and an en banc review was granted. En banc argument was held in San Francisco before the panel of the Ninth Circuit Court of Appeals and the decision reversed the panel's decision. The en banc court found that,

> "Changing the rules after the event and requiring a second trial is understandably troublesome, but a trial is not a game, and the Constitution is not a set of game rules. The Constitution is a solemn promise that the people of this nation have made to each other that neither life nor liberty shall be taken by our government without faithful adherence to a basic principles." (95 F.3d 881).

As a result of the en banc decision in the Keys matter, as the dissenting opinion states, the Ninth Circuit set itself up against the various other circuits within the United States. Therefore, the Acting Solicitor General filed a petition for Certiorari to address the issues presented in the Keys matter. However, the case of Johnson vs. United States, Case No. 96-203, a similar issue as the Keys matter but decided on a different basis, has made its way up to the Supreme Court on a tract different from the Keys matter. It is respectfully requested that the Keys matter be joined with the Johnson matter, since Keys is the focal point case creating the *circuit conflict* in respect to the issues presented as to materiality in the application of the doctrine of plain error vs. structural error requiring a reversal.

The Johnson matter was a petition filed by the defendant after his unsuccessful appeals to the Eleventh Circuit. In the Keys matter, the *government* has petitioned to the United States Supreme Court based upon the en banc decision in favor of the respondent, which had set up the

conflict among the circuits as to the application of plain error vs. structural error.

Similar to the case of United States vs. Ursery, 116 S.Ct. 2135 (1996), which was joined with the "405" case for one decision by the United States Supreme Court, it is respectfully requested that the Keys case be joined and set for oral argument contemporaneously with the Johnson matter to fully brief the issues that were presented in the en banc ruling in the Keys matter. We request the Court to view Footnote 2 on page 7 in the Acting Solicitor General's Petition for a Writ of Certiorari where it appears that the Tenth Circuit has now joined the Ninth Circuit in an analysis of structural error vs. harmless error.

Therefore the Keys decision, being the focal point of the issues presented in Johnson, should be joined without regard to the current briefing schedule and oral argument therein. Both matters should be set for oral argument and rebriefing with the Keys matter joined to the Johnson matter for final determination of the questions and issues presented.

CONCLUSION

It is respectfully requested that the Petition for a Writ of Certiorari be denied by the Court. However, should Certiorari be granted in the Keys matter, it is requested that the Keys matter not be held in abeyance, but rather, be briefed and orally argued concurrently with the Johnson matter to present squarely to this Court the issue of plain error vs. structural error under 52(a) and 52(b) of the Federal Rules of Criminal Procedure.

Date: January 23, 1997

Respectfully submitted,

Errol H. Stambler
Attorney for Respondent